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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SHANNON RAY, KHALA TAYLOR, PETER ROBINSON, KATHERINE SEBBANE, and RUDY BARAJAS, individually and on behalf of all those similarly situated,

Plaintiffs,

vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association,

Defendant.

Case No. 1:23-CV-00425-WBS-CSK

DEFENDANT NCAA'S EVIDENTIARY OBJECTIONS TO MATERIALS CITED IN PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Judge: Hon. William B. Shubb
Courtroom: 5, 14th Floor
Date: September 29, 2025
Time: 1:30 PM

DEFENDANT NCAA'S EVIDENTIARY OBJECTIONS TO MATERIALS CITED IN PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs, as the party moving for summary judgment, have the burden to show there is no genuine dispute of material fact by "citing to particular parts of materials in the record." Fed. R. Civ. P. 56(c)(1)(A). The NCAA may "object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." *Id.* 56(c)(2). The NCAA hereby objects to the following materials Plaintiffs cite in support of their motion for partial summary judgment on the basis that such materials would not be admissible in evidence at trial.[1]

1. The NCAA objects to Exhibit 18 to the Declaration of Michael Lieberman in Support of Plaintiffs' Motion for Summary Judgment ("Lieberman Declaration") under Federal Rule of Evidence 407 insofar as Plaintiffs rely on the repeal of the challenged bylaws to prove the NCAA engaged in culpable conduct. *See* Fed. R. Evid. 407; *Noble v. McClatchy Newspapers*, 533 F.2d 1081, 1090 (9th Cir. 1975) (affirming decision "to exclude evidence that McClatchy deleted allegedly anticompetitive provisions in the distributorship contracts" (citing Fed. R. Evid. 407)), *vacated on other grounds*, 433 U.S. 904 (1977).

2. The NCAA objects to Exhibits 7 and 25 to the Lieberman Declaration under Federal Rule of Evidence 407 insofar as Plaintiffs rely on those materials to argue that "college athletics has continued unabated and is generating record revenues" following the repeal of the challenged bylaws. Mot. at 13; Plaintiffs' Statement of Undisputed Facts 47; *see also* Fed. R. Evid. 407; *see also, e.g.*, *United States v. Patel*, No. 3:21-cr-220 (VAB), 2023 WL 2643815, at *28 (D. Conn. Mar. 27, 2023) ("[E]vidence that, after the end of the alleged conspiracy, Defendants . . . successfully engaged in the business of aerospace engineering services without the use of no-poach agreements with competitors is inadmissible under Rule 407." (cleaned up)).

[1] For purposes of this motion, the NCAA will not object to evidence that is only irrelevant, speculative, or argumentative, or that constitutes improper legal conclusions. Although the NCAA reserves the right to raise such objections at trial, they are "duplicative of the summary judgment standard" and are encompassed within the NCAA's argument that certain facts are not material. *Burch v. Regents of Univ. of Cal.*, 433 F. Supp. 2d 1110, 1118–20 (E.D. Cal. 2006) (Shubb, J.).

3. The NCAA objects to evidence of statements made by the NCAA Division I Council Legislative Committee (Exhibit 18 to the Lieberman Declaration), the NCAA Division I Transformation Committee (Exhibits 19 and 21), the NCAA Division I Legislative Committee Modernization of the Rules Subcommittee (Exhibit 20), and Southeastern Conference Commissioner Greg Sankey (Exhibit 23), insofar as Plaintiffs contend that those statements show that the challenged bylaws were wrongful or anticompetitive. *See* Mot. at 6–7, 18–19, 21–22, 27; Plaintiffs' Statement of Undisputed Facts 32–38, 44. The repeal of the bylaws is a measure "that would have made an earlier injury or harm less likely to occur," and statements advocating for the repeal are inadmissible under Federal Rule of Evidence 407. Fed. R. Evid. 407; *see, e.g.*, *In re Air Crash Disaster*, 86 F.3d 498, 532 (6th Cir. 1996) (holding memorandum that was "part of a discussion about whether McDonnell Douglas should recommend [a] check in the future" was inadmissible under Federal Rule of Evidence 407); *Polypack, Inc. v. Nestle USA, Inc.*, No. 8:23-cv-318-SPF, 2025 WL 1148684, at *4 (M.D. Fla. Apr. 18, 2025) (holding "forward-facing recommendations" that "set forth an action plan" and "proposed a remedy" based on prior experience inadmissible under Federal Rule of Evidence 407); *Alimenta (U.S.A.), Inc. v. Stauffer*, 598 F. Supp. 934, 940 (N.D. Ga. 1984) (holding report prepared "for the purpose of improving . . . procedures and controls" inadmissible under Federal Rule of Evidence 407).

4. The NCAA objects to Exhibit 23 to the Lieberman Declaration on the grounds that the statements cited in Mr. Sankey's letter are hearsay that do not fall with any exemption or exception to the hearsay rules. Plaintiffs proffer the out-of-court statements in the letter to prove the truth of the matters asserted therein. *E.g.*, Mot. at 21–22 (relying on assertion in Mr. Sankey's letter that eliminating the volunteer coach position would increase opportunities to support an inference that the volunteer coach position "did not expand opportunities"). Because no exemption or exception applies, the letter is inadmissible under Federal Rule of Evidence 802.

5. Mr. Sankey's statements concerning the repeal of the bylaw, as reflected in Exhibit 23 to the Lieberman Declaration, do not qualify under the "co-conspirator" exemption to hearsay, Fed. R. Evid. 801(d)(2)(E), because statements that seek to terminate an alleged conspiracy are not made "in furtherance of the conspiracy." *See United States v. Williams*, 989

F.2d 1061, 1068 (9th Cir. 1993) (statement is in furtherance of a conspiracy only if it "advance[s] a common objective of the conspiracy or set[s] in motion a transaction that is an integral part of the conspiracy"); *United States v. Nazemian*, 948 F.2d 522, 529–30 (9th Cir. 1991) (district court clearly erred by admitting co-conspirator statement that indicated co-conspirator's desire "to thwart" the alleged conspiracy).

DATED: August 15, 2025

MUNGER, TOLLES & OLSON LLP

By: */s/ Justin P. Raphael*
JUSTIN P. RAPHAEL
Attorneys for Defendant National Collegiate Athletic Association

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys or record registered for electronic filing.

By: */s/ Justin P. Raphael*
Justin P. Raphael